TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 856.

JOHN WARREN AND J. KEARNEY WARREN, PLAINTIFFS IN ERROR,

vs.

SHERIDAN SHOOK, LATE COLLECTOR OF INTERNAL REVENUE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED NOVEMBER 29, 1875.

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1 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between John Warren & J. Kearney Warren, and Sheridan Shook, a manifest error hath happened, to the great damage of the said John Warren and J. Kearney Warren, as is said, and as appears by their complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capital in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this tenth day of April, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States the ninety-ninth.

KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is allowed, April 10th, 1875.

SAM'L BLATCHFORD, *D. J.*

2 Filed Apl. 13, 1875.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Kenneth G. White, clerk of the circuit court of the United States for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto,
3 do hereby certify that the following pages, numbered from one to thirty-nine inclusive, contains a true and complete transcript of the record and proceeding had in said court in the case of John Warren and J. Kearney Warren, plaintiff' in error, agst. Sheridan Shook, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 28th day of September, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the said United States the one hundredth.

[SEAL.] KENNETH G. WHITE,
Clerk.

4 U. S. circuit court for the southern district of New York, in the second circuit.

Pleas before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court buildings in the city of New York, of the term of October, 1871, to wit, of the 22d day of March, in the year of our Lord one thousand eight hundred and seventy-two.

Witness the honorable Lewis B. Woodruff, one of the judges of the said circuit court.

KENNETH G. WHITE,
Clerk.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that heretofore, to wit, on the 21st day of March, 1872, in the October term, 1871, before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court buildings, in the city of New York, came John Warren and J. Harvey Warren, by Benjamin K. Phelps, their attorney, and brought into the said court, before the aforesaid judges thereof, then there, their certain declaration against Sheridan Shook, being in custody, &c., of a plea of trespass on the case upon promises; which said declaration follows in these words, that is to say:

5 Circuit court of the United States for the southern district of New York, in the second circuit.

JOHN WARREN AND J. HARVEY WARREN, plaintiffs,
against
SHERIDAN SHOOK, DEFENDANT.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The plaintiffs, by Phelps & Knevals, their attorneys, come here into court, and suggest and give the court, now here, to understand and be informed, that heretofore, to wit, on the first day of August, A. D. 1871, a suit was duly commenced in the court of common pleas for the city and county of New York, in favor of the plaintiffs above named, against the defendant herein by summons upon and for the same cause of action hereinafter set forth.

That the said defendant, afterwards, duly appeared in said
6 suit, by Noah Davis, esq., his attorney, and such proceedings were had thereupon, that afterwards, to wit, on the twenty-third day of September, A. D. 1871, said suit was duly moved by writ of certiorari to this court, agreeably to the provisions of the statute in such case made and provided.

That, upon the removal of such suit, it is made to appear to this court that no copy of the record and proceedings therein, in the said court of common pleas, can be obtained, which allegations and suggestions the defendant does not deny, but admits the same to be true.

Wherefore let the plaintiffs proceed de novo and file a declaration of their cause of action, and let the parties thereupon proceed as in action originally brought in this court.

And the plaintiffs now, according to law, by their attorneys aforesaid,

complain of the defendant herein, in a plea of trespass on the case upon promises.

7 For that, whereas, the said John Warren and J. Harvey Warren were copartners, composing the firm of John Warren & Son, to wit, at the city of New York, in said district, and during all the time from the first day of April, 1865, until the first day of May, 1866, were engaged in the business of bankers, having a place of business as such bankers in the thirty-second collection-district of New York;

And whereas, during all the time aforesaid, the said plaintiffs carried on said business as bankers, in said thirty-second collection-district, and duly paid the special tax imposed upon them, the said plaintiffs as bankers, as aforesaid, under and in pursuance of the provisions of the seventy-ninth section of the act of Congress, entitled "An act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes," approved June 30th, 1864;

8 And whereas, also, during the time aforesaid, in said district the said plaintiffs, as such partners as aforesaid, bought and sold gold, stocks, bonds, bullion, bills of exchange, promissory notes, and other securities on their own account, and not on commission or for others;

And whereas, also, the assessor of internal revenue of the United States, in and for the said thirty-second collection-district of New York, under a false and illegal claim that such sales as aforesaid were made by the said plaintiffs as brokers, or as bankers doing business as brokers, assessed monthly in said district, during the time aforesaid, an erroneous and illegal tax against the said plaintiffs upon such sales made during the respective months previous to such monthly assessment, when, in truth, the said plaintiffs were exempt from any taxation upon such sales, and said plaintiffs then and there protested against such assessment, and against the payment of any such erroneous or illegal tax, or any part thereof;

9 And whereas, also, during all the time aforesaid, and at the times of the payments hereinafter more particularly specified, the defendant held the office and performed the duties of collector of internal revenue in and for said thirty-second collection district of New York, and monthly after such assessment of the aforesaid erroneous and illegal tax upon such sales as aforesaid, as such collector demanded of the said plaintiffs the payment of the same; and they, the said plaintiffs, were compelled to, and did, under protest, then and there pay to the defendant, as such collector, the said erroneous and illegal taxes.

And whereas the plaintiffs allege that in the month of May, 1865, in said district, in the manner above stated, the assessor of said collection district assessed upon said plaintiffs, in respect to sales so made

10 by them as above stated, for the month previous to such assessment, an erroneous and illegal tax of $501.28, and the defendant, as such collector in manner above stated, then and there collected the same from said plaintiffs, who were thereupon compelled to pay, and did pay, the said defendant the said sum of $501.28 on or about the 16th day of June, 1865.

And whereas the plaintiffs allege that in the month of June, 1865, in said district, in the manner above stated, the assessor of said collection district assessed upon said plaintiffs in respect to sales so made by them as above stated, for the month previous to such assessment, an erroneous and illegal tax of $295.25, and the defendant, as such collector, in manner above stated, then and there collected the same from said plaintiffs, who were thereupon compelled to pay, and did pay, to the said

4 U. S. circuit court for the southern district of New York, in the second circuit.

Pleas before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court buildings in the city of New York, of the term of October, 1871, to wit, of the 22d day of March, in the year of our Lord one thousand eight hundred and seventy-two.

Witness the honorable Lewis B. Woodruff, one of the judges of the said circuit court.

KENNETH G. WHITE,
Clerk.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that heretofore, to wit, on the 21st day of March, 1872, in the October term, 1871, before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court buildings, in the city of New York, came John Warren and J. Harvey Warren, by Benjamin K. Phelps, their attorney, and brought into the said court, before the aforesaid judges thereof, then there, their certain declaration against Sheridan Shook, being in custody, &c., of a plea of trespass on the case upon promises; which said declaration follows in these words, that is to say:

5 Circuit court of the United States for the southern district of New York, in the second circuit.

JOHN WARREN AND J. HARVEY WARREN, plaintiffs,
against
SHERIDAN SHOOK, DEFENDANT.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The plaintiffs, by Phelps & Knevals, their attorneys, come here into court, and suggest and give the court, now here, to understand and be informed, that heretofore, to wit, on the first day of August, A. D. 1871, a suit was duly commenced in the court of common pleas for the city and county of New York, in favor of the plaintiffs above named, against the defendant herein by summons upon and for the same cause of action hereinafter set forth.

That the said defendant, afterwards, duly appeared in said
6 suit, by Noah Davis, esq., his attorney, and such proceedings were had thereupon, that afterwards, to wit, on the twenty-third day of September, A. D. 1871, said suit was duly moved by writ of certiorari to this court, agreeably to the provisions of the statute in such case made and provided.

That, upon the removal of such suit, it is made to appear to this court that no copy of the record and proceedings therein, in the said court of common pleas, can be obtained, which allegations and suggestions the defendant does not deny, but admits the same to be true.

Wherefore let the plaintiffs proceed de novo and file a declaration of their cause of action, and let the parties thereupon proceed as in action originally brought in this court.

And the plaintiffs now, according to law, by their attorneys aforesaid,

complain of the defendant herein, in a plea of trespass on the case upon promises.

7 For that, whereas, the said John Warren and J. Harvey Warren were copartners, composing the firm of John Warren & Son, to wit, at the city of New York, in said district, and during all the time from the first day of April, 1865, until the first day of May, 1866, were engaged in the business of bankers, having a place of business as such bankers in the thirty-second collection-district of New York;

And whereas, during all the time aforesaid, the said plaintiffs carried on said business as bankers, in said thirty-second collection-district, and duly paid the special tax imposed upon them, the said plaintiffs as bankers, as aforesaid, under and in pursuance of the provisions of the seventy-ninth section of the act of Congress, entitled "An act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes," approved June 30th, 1864;

8 And whereas, also, during the time aforesaid, in said district the said plaintiffs, as such partners as aforesaid, bought and sold gold, stocks, bonds, bullion, bills of exchange, promissory notes, and other securities on their own account, and not on commission or for others;

And whereas, also, the assessor of internal revenue of the United States, in and for the said thirty-second collection-district of New York, under a false and illegal claim that such sales as aforesaid were made by the said plaintiffs as brokers, or as bankers doing business as brokers, assessed monthly in said district, during the time aforesaid, an erroneous and illegal tax against the said plaintiffs upon such sales made during the respective months previous to such monthly assessment, when, in truth, the said plaintiffs were exempt from any taxation upon such sales, and said plaintiffs then and there protested against such assessment, and against the payment of any such erroneous or illegal tax, or any part thereof;

9 And whereas, also, during all the time aforesaid, and at the times of the payments hereinafter more particularly specified, the defendant held the office and performed the duties of collector of internal revenue in and for said thirty-second collection district of New York, and monthly after such assessment of the aforesaid erroneous and illegal tax upon such sales as aforesaid, as such collector demanded of the said plaintiffs the payment of the same; and they, the said plaintiffs, were compelled to, and did, under protest, then and there pay to the defendant, as such collector, the said erroneous and illegal taxes.

And whereas the plaintiffs allege that in the month of May, 1865, in said district, in the manner above stated, the assessor of said collection district assessed upon said plaintiffs in respect to sales so made

10 by them as above stated, for the month previous to such assessment, an erroneous and illegal tax of $501.28, and the defendant, as such collector in manner above stated, then and there collected the same from said plaintiffs, who were thereupon compelled to pay, and did pay, the said defendant the said sum of $501.28 on or about the 16th day of June, 1865.

And whereas the plaintiffs allege that in the month of June, 1865, in said district, in the manner above stated, the assessor of said collection district assessed upon said plaintiffs in respect to sales so made by them as above stated, for the month previous to such assessment, an erroneous and illegal tax of $295.25, and the defendant, as such collector, in manner above stated, then and there collected the same from said plaintiffs, who were thereupon compelled to pay, and did pay, to the said

defendant the said sum of $295.25 on or about the 27th day of June, 1865.

11 And whereas the plaintiffs allege that in the month of July, 1865, in said district, in the manner above stated, the assessor of said collection district assessed upon said plaintiffs in respect to sales so made by them as above stated, for the month previous to such assessment, an erroneous and illegal tax of $219.00, and the defendant, as such collector, in manner above stated, then and there collected the same from said plaintiffs, who were thereupon compelled to pay, and did pay, to the said defendant the said sum of $219.00 on or about the 19th day of August, 1865.

And whereas the plaintiffs allege that in the month of August, 1865, in said district, in the manner above stated, the assessor of said collection district assessed upon said plaintiffs in respect to sales so made by them as above stated, for the month previous to such assessment, an erroneous and illegal tax of $366.75, and the defendant, as such

12 collector, in manner above stated, then and there collected the same from said plaintiffs, who were thereupon compelled to pay, and did pay, to the said defendant the said sum of $366.75 on or about the 18th day of September, 1865.

And whereas the plaintiffs allege that in the month of September, 1865, in said district, in the manner above stated, the assessor of said collection district assessed upon said plaintiffs in respect to sales so made by them as above stated, for the month previous to such assessment, an erroneous and illegal tax of $287.50, and the defendant, as such collector, in manner above above stated, then and there collected the same from said plaintiffs, who were thereupon compelled to pay, and did pay, to the said defendant the said sum of $287.50 on or about the 13th day of October, 1865.

And whereas the plaintiffs allege that in the month of Octo-

13 ber, 1865, in said district, in the manner above stated, the assessor of said collection district assessed upon said plaintiffs in respect to sales so made by them as above stated, for the month previous to such assessment, an erroneous and illegal tax of $422.95, and the defendant, as such collector, in manner above stated, then and there collected the same from said plaintiffs, who were thereupon compelled to pay, and did pay, to the said defendant the said sum of $422.95 on or about the 1st day of December, 1865.

And whereas the plaintiffs allege that in the month of November, 1865, in said district, in the manner above stated, the assessor of said collection district assessed upon said plaintiffs in respect to sales so made by them as above stated, for the month previous to such assessment, an erroneous and illegal tax of $685.50, and the defendant, as such collector, in manner above stated, then and there collected

14 the same from the said plaintiffs, who were thereupon compelled to pay, and did pay, to the said defendant the said sum of $685.50, on or about the 6th day of January, 1866.

And whereas the plaintiffs allege that in the month of December, 1865, in said district, in the manner above stated, the assessor of said collection district assessed upon said plaintiffs in respect to sales so made by them as above stated, for the month previous to such assessment, an erroneous and illegal tax of $124.20, and the defendant, as such collector, in manner above stated, then and there collected the same from said plaintiffs, who were thereupon compelled to pay, and did pay, to the said defendant the said sum of $124.20 on or about the 18th day of January, 1866.

And whereas the plaintiffs allege that in the month of March, 1866, in said district, in the manner above stated, the assessor of said
15 collection district assessed upon said plaintiffs in respect to sales so made by them as above stated, for the month previous to such assessment, an erroneous and illegal tax of $172.50, and the defendant, as such collector, in manner above stated, then and there collected the same from said plaintiffs, who were thereupon compelled to pay, and did pay, to the said defendant the said sum of $172.50 on or about the 2d day of April, 1866.

And whereas the plaintiffs allege that in the month of April, 1866, in said district, in the manner above stated, the assessor of said collection district assessed upon said plaintiffs in respect to sales so made by them as above stated, for the month previous to such assessment, an erroneous and illegal tax of $311.50, and the defendant as such collector, in manner above stated, then and there collected the same from said plaintiffs, who were thereupon compelled to pay, and did pay,
16 to the said defendant the said sum of $311.50 on or about the 28th day of April, 1866.

Which said several sums of money above mentioned, erroneously and illegally assessed upon and collected from said plaintiffs, during the period aforesaid, in the district aforesaid, in the manner aforesaid, amounted in all to the sum of 3,386.43, which sum the said defendant, as such collector as aforesaid, received and collected from these plaintiffs at the times and in the manner aforesaid.

And whereas, also, on or about the 3rd day of December, A. D. 1870, the said plaintiffs, according to the provisions of law in that behalf, and the regulations made by the Secretary of the Treasury in pursuance thereof, made an appeal to the Commissioner of Internal Revenue from the said erroneous and illegal assessments upon and collection from said plaintiffs of the aforesaid erroneous taxes, by which said appeal the said plaintiffs did claim and demand that said Commis-
17 sioner of Internal Revenue should remit and refund to said plaintiffs each and all of the sums of money so paid by said plaintiffs to the said defendant as aforesaid, as and for the said erroneous and illegal taxes aforesaid; and whereas the said Commissioner of Internal Revenue then and there entertained such appeal, and on or about the 24th day of May, 1871, decided the same adversely to the said plaintiffs; and this action is now brought by the plaintiffs against the defendant, within six months from the time of said decision by the said Commissioner, upon said appeal.

By means of which several premises the said defendant then and there became liable to pay back to the said plaintiffs the said several sums of money, together with the lawful interest thereon from the time of the payment thereof to the said defendant as above mentioned; and being so liable, the defendant, in consideration thereof, heretofore,
18 to wit, on the 30th day of May, A. D. 1871, at New York, in said district, undertook, and then and there faithfully promised the said plaintiffs to pay them the said last-mentioned sum of $3,386.43, with interest as aforesaid, when he, the said defendant, should be thereunto afterwards requested. Yet the said defendant, although often requested, the same has not paid, but to pay the same or any part thereof to the said plaintiffs the said defendant hath hitherto altogether refused, and doth still refuse.

And whereas also the said defendant, afterward, to wit, on the same day and year, and at the place aforesaid, being then and there collector of internal revenue for the thirty-second collection-district of New York,

was indebted to the said plaintiffs in the sum of $3,386.43 *dollars*, lawful money of the United States of America, for money before
19 that time lent and advanced by said plaintiffs to the said defendant at the special instance and request of him, the said defendant;

And for other moneys by said plaintiffs before that time paid, laid out, and expended for the said defendant, at the special instance and request of him, the said defendant;

And for other moneys by the said defendant before that time had and received to the use of the said plaintiffs;

And, being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year and at the place last aforesaid, undertook and faithfully promised the said plaintiffs well and truly to pay the said plaintiffs the said sum of money in this court mentioned, when the defendant should be afterwards thereto requested;

And whereas also the said defendant, afterwards, to wit, on the
20 same day and year, and at the place last aforesaid, accounted, together with the said plaintiffs, of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiffs, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there was found to be in arrear and indebted to the said plaintiffs in the further sum of four thousand dollars of lawful money as aforesaid; and being so found in arrear and indebted to the said plaintiffs, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place last aforesaid, undertook, and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the said sum of money last mentioned, when the said defendant should be thereunto requested.

Nevertheless the said defendant, though often requested, &c.,
21 has not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiffs, but to pay the said sums, or any part thereof, has hitherto wholly refused, and doth still refuse, to the damage of the said plaintiffs of four thousand dollars, and therefore the plaintiff brings suit, &c.

PHELPS & KNEVALS,
Attorneys for Plaintiffs, 82 *Nassau Street*.

22 U. S. circuit court, southern district of New York.

SHERIDAN SHOOK
ads.
JOHN WARREN, J. HARVEY WARREN. } Plea.

And the said defendant, Sheridan Shook, by Noah Davis, his attorney, comes and defends the wrong and injury, when, &c., and says that he did not undertake and promise, in manner and form as the said plaintiffs in this suit have above thereof declared, against the said defendant, and of this he puts himself upon the country, and the said plaintiffs do the like, &c.

NOAH DAVIS,
Defendant's Attorney.

To PHELPS & KNEVALS, Esqs.,
Plaintiffs' Attorneys.

(Endorsed:) U. S. circuit court. Sheridan Shook ads. John Warren & J. Harvey Warren. Plea. Noah Davis, attorney for defendant.

Due service of a copy of within is hereby admitted.

New York, March 23, '72.

PHELPS & KNEVALS,
Plffs.' Attys.

You will please take notice that the plea of the defendant in the above cause, of which the within is a copy, was this day filed in the office of the clerk of the U. S. circuit court for the southern district of New York.

New York, March 22d, 1872.

Yours, &c.,

NOAH DAVIS,
Defendant's Attorney.

To PHELPS & KNEVALS, Esqs.,
Plaintiffs' Attorneys.

23 Therefore it is ordered that the issues joined as aforesaid be tried at a circuit court of the United States for the southern district of New York, to be held at the United States court building, No. 41 Chambers street, in the city of New York, on the 3rd Monday in October, 1871, at which day and place the said issues were not tried, but continued to the April term, 1874, of said court, at which term of said court, at the place aforesaid, to wit, on the 21st of April, 1874, the said parties, by their respective attorneys, appeared and in open court waived a jury and consented that the issues joined as aforesaid be tried and determined by the court, and did then and there file a stipulation in writing to that effect with the clerk. That in pursuance of said stipulation the said issues came on to be tried before the hon'ble L. B. Woodruff, a circuit judge holding said court, &c., and the said court, having
24 heard the allegations and proof submitted by the respective parties, took the same under advisement, and afterwards, to wit, on the 12th day of May, 1874, rendered his findings and decision thereon in favor of the defendant, which findings and decision were filed on the day and year last mentioned with the clerk of the said court.

Therefore it is considered that the plaintiffs take nothing by their declaration, but that they be in mercy, &c., and that the said defendant go thereof without day, &c. And it is further considered by the said court now here that the said defendant do recover against the said plaintiffs twenty-four dollars and sixty-nine cents for his cost and charges by him about his defence in this behalf expended, by the said court here adjudged to the said defendant, and that the defendant have execution thereof, &c., &c.

Judgment signed this 22d day of Sept., 1874.

R. E. STILLWELL,
Dep. Clerk.

(Endorsed:) U. S. circuit court. Sheridan Shook ads. John Warren & als. Judgment record.

Filed, Sept. 22d, 1874.

25 Circuit court of the United States for the southern district of New York.

JOHN WARREN ET AL.
v.
SHERIDAN SHOOK, & 28 OTHER CASES. } 1874. April calendar, Nos. 69 to 97, inclusive.

WOODRUFF, J.:

I find no sufficient reason for doubting the correctness of my conclu-

sion in Northrup v. Shook, (10 Blatch., 243,) on the question in controversy in these cases.

Let judgment be rendered for the defendant in each of them.

(Endorsed:) Circuit court of the United States for the so. dist. of N. Y. Warren et al. vs. Sheridan Shook, and 28 other cases. Mem. Filed May 22, 1874.

26 Circuit court of the United States for the southern district of New York.

JOHN WARREN AND J. KEARNEY WARREN
against
SHERIDAN SHOOK, COLLECTOR, &C. } Bill of exceptions.

Afterwards, to wit, at a circuit court of the United States, held at the court-house, in the city of New York, in and for the southern district of New York, in the second circuit, on the twenty-first day of April, in the year one thousand eight hundred and seventy-four, before the honorable Lewis B. Woodruff, the circuit judge, the aforesaid issue so joined between the said parties as aforesaid came on to be tried; at which day came there as well the said plaintiffs as the said defendant, by their respective attorneys aforesaid, and a jury having been duly waived
27 by the respective parties pursuant to the act of Congress in such case made and provided, plaintiffs' counsel read as evidence in the case the following agreed statement of facts:

First. "That the plaintiffs, from the first day of April, 1865, to the first day of May, 1866, were copartners in the city of New York, doing business under the firm-name of 'John Warren & Son.'"

Second. That during such time the plaintiffs, as such copartners, had a place of business in the thirty-second collection-district of New York, where credits were opened by the deposit and collection of money and currency subject to be paid or remitted upon draft, check, or order, and where money was advanced and loaned by plaintiffs on stocks, bonds, bullion, bills of exchange, and promissory notes, and where stocks, bonds, bullion, bills of exchange, and promissory notes were received by plaintiffs for discount and sale.

Third. That during the period aforesaid the said plaintiffs, as
28 such copartners, duly paid the special tax imposed upon them as bankers, in accordance with the provisions of the seventy-ninth section of the act of Congress entitled "An act to provide internal revenue to support the Government," &c., approved June 30th, 1864.

Fourth. That during the period aforesaid, the defendant was collector of internal revenue for the said thirty-second collection-district of New York.

Fifth. That during the period aforesaid the plaintiffs bought and sold stock and gold, both of their own property on their own account, and also upon commission for other parties.

The sales in question were of three kinds:

First. Sales of their own property.

Second. Sales of gold, stocks, bonds, bullion, &c., transmitted to them by their correspondents, and the same or the proceeds drawn against; in some of which cases the sales of the transmitted property
29 were made immediately, and the proceeds at once applied to the payments of drafts so drawn; and in others of which the drafts were accepted or paid; and the gold, stock, &c., were held for a better market or to await further orders, and in the mean time stood as their

security for their advances, and to provide re-imbursement therefor. In other cases there were no actual advances, but the property held for sale, and, when sold by order of the customer, the proceeds were placed to credit, subject to draft.

Third. Sales of stock made in pursuance of an arrangement for what is called carrying stocks on a margin, wherein they, upon the deposit with them of a percentage on the amount of the stocks, advanced money and purchased stocks for the dealer or speculator, (who dealt in hope of making a profit by the rise in the market-price,) and held the same subject to his order to sell, and finally sold the same for his
30 account as to profit and loss. These transactions were conducted in the name of the plaintiffs, the name of the customer not being disclosed to those to whom the stocks were finally sold.

Upon these purchases and sales they charged and received from their customers the usual commission for purchasing and selling stocks for account of others, and the tax imposed and paid to the United States on the sales were also charged to such customer. If the transaction showed a profit it was paid to the customer, with a return to him of the cash or security held as a margin. If the transaction resulted in a loss the amount of such margin returned to the customer was correspondingly reduced.

Sixth. That during the period aforesaid the assessor of internal revenue for the said district assessed monthly against the said plaintiffs the tax of one-twentieth of one per centum on stock, securities,
31 gold, &c., provided for by the ninety-ninth section of the act aforesaid, to be paid by brokers and bankers doing business as brokers, and assessed such tax against the plaintiffs alike upon the securities, stocks, bullion, &c., sold by them on commission for others, and upon those owned by said plaintiffs and sold by them upon their own account.

Seventh. That at the times of the said several assessments so made by said assessor, the plaintiffs protested against their liability to pay and against the right of the said assessor to impose or assess the said tax of one-twentieth of one per centum, or any other sum whatever, upon the value of the stocks, gold, or securities owned by said plaintiffs and sold by them upon and for their own account, and not upon commission or for others.

Eighth. That the assessment-roll containing said assessment was transmitted to the said defendant as such collector, and the said
32 defendant as such collector demanded from said plaintiffs the whole sum so assessed against them by said assessor as and for the said tax, and the plaintiffs were compelled to pay, and did pay under protest to the said defendant, as such collector, the said tax upon the whole amount of their sales during said period, including sales made on their own account as aforesaid.

Ninth. That the amount of such payments so made by the said plaintiffs, with the dates thereof, are correctly set forth in the schedule hereto annexed, marked "A," the first column in such schedule showing the whole amount of such tax paid at the respective dates therein indicated; and the second column showing the portions of said several payments which were for taxes upon sales made by plaintiffs upon their own account and not upon commission, and which plaintiffs seek in this action to recover.

Tenth. That about the third day of December, 1870, the plaint-
33 iffs duly appealed pursuant to law and the regulations of the Treasury Department, made in pursuance thereof, to the Commis-

sioner of Internal Revenue, from the assessment and collection of said taxes, imposed upon said plaintiffs, upon sales made by them upon their own account, and claimed by them to be erroneously and illegally assessed against and collected from them. And the said Commissioner, on the twenty-fourth day of May, 1871, and less than six months before the commencement of this action, rendered his decision upon said appeal adversely to these plaintiffs.

(Signed) GEORGE BLISS,
U. S. Attorney.
BENJ. K. PHELPS,
Plff's'. Attorney.

No further evidence was offered by either party.

Thereupon the counsel for the said defendant moved the court that judgment be entered for the defendant, and said plaintiffs' coun-
34 sel moved that judgment be entered for the plaintiffs.

After argument and deliberation, the court denied the said motion of said plaintiffs' counsel, whereupon the said counsel for the plaintiffs did then and there duly except thereto.

The court then directed that judgment be entered for the defendant; to which direction and conclusions of law of the court upon the foregoing facts set forth in said direction the said plaintiffs' counsel then and there duly excepted.

And because none of the said exceptions so offered and made to the opinion and decision of the said circuit judge do appear upon the record of the said trial, therefore, on the prayer of the plaintiffs by their counsel, the said circuit judge hath to this bill of exceptions put his seal, according to the statute in such case made and provided, this tenth day of April, in the year one thousand eight hundred and seventy-five, as of the 21st day of April, 1874.

LEWIS B. WOODRUFF,
Circuit Judge.

35 SCHEDULE A.

List of taxes paid by John Warren & Son on sales of stocks and gold.

				Bills paid.	Amt. for own account.
1865.					
June	16.	For April, on stock.....	$597 50		
		" " on gold	28 78		
				626 28	501 28
	27.	For May, on stock	$324 65		
		" " on gold	38 42		
				363 07	295 25
August	19.	For June, on stock	$242 50		
				242 50	219 00
September	18.	For July, on stock	$515 75		
		" " on gold.....	60		
				516 35	366 75
October	13.	For August, on stock.....	$346 50		
				346 50	287 50
December	1.	For September, on stock ..	$422 95		
		" " on stock ..	510 20		
				933 15	422 95
1866.					
Jany.	6.	For October, on stock	$805 97		
		" " on stock	685 50		
				1,491 47	685 50

	18. For November, on stock..	$520 11		
	Allowed overpaid for Sept.	422 95		
			103 16	124 20
April	2. For Feby., on stock	$185 60		
	" " on stock	172 50		
			358 10	172 50
	28. For March, on stock.....	$227 10		
	" " on stock.....	311 50		
			538 60	311 50
Sept.	21. For April, on stock	$210 31		
	" May, " "	93 86		
	" " " "	95 64		
			399 81	.....
				$3,386 43

35 (Indorsed:) John Warren and John Kearney Warren against Sheridan Shook, collector, &c. Bill of exceptions. Phelps & Knevals, plffs.' attys.' 82 Nassau st., N. Y.

Within bill of exceptions is hereby consented and agreed to, as to form.

GEORGE BLISS,
U. S. Atty., Atty. for Deft.

Filed April 12th, 1875.

36 Circuit court of the United States of America for the southern district of New York, in the second circuit.

JOHN WARREN AND J. KEARNEY WARREN
vs.
SHERIDAN SHOOK.
} Bond for costs.

Know all men by these presents that we, James K. Warren, Charles L. Cammann, and Robert H. Neilson, are held and firmly bound unto the above-named Sheridan Shook in the sum of five hundred dollars, to be paid to the said Sheridan Shook, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally firmly by these presents, sealed with our seals, and dated the 22d day of September, in the year of our Lord one thousand eight hundred and seventy-five.

Whereas the above-named John Warren & J. Kearney Warren have prosecuted their writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York.

Now, therefore, the condition of this obligation is such that if the above-named John Warren & J. Kearney Warren shall prosecute their writ of error to effect, and answer all damages and costs if they fail to make their said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JAMES K. WARREN. [L. S.]
CHARLES L. CAMMANN. [L. S.]
ROBT. H. NEILSON. [L. S.]

Sealed and delivered, and taken and acknowledged this 22 day of Sept., 1875, before me.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

37 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Charles L. Cammann, of Fordham, New York City, and Robert H. Neilson, of New Brunswick, State of New Jersey, being duly sworn, doth depose and say, and each for himself saith, that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

CHARLES L. CAMMANN.
ROBERT H. NEILSON.

Sworn to this 22 day of Sept., A. D. 1875, before me.
JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

The foregoing bond is approved as to form and amount, and the sufficiency of the sureties.

SAML. BLATCHFORD.

SEPT. 25, 1875.

(Indorsed:) Vol. , page , U. S. circuit court. John Warren et al. vs. Sheridan Shook, collector, &c. Bond for costs on Phelps & Knevals, plffs.' proctors. Filed this 27 day of Sept., 1875.

Approved as to form.

GEORGE BLISS,
U. S. Atty.

38 United States of America to Sheridan Shook, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, in the second circuit, wherein John Warren and J. Kearney Warren are plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel Blatchford, one of the judges of the circuit court of the United States for the southern district of New York, this tenth day of April, in the year of our Lord one thousand eight hundred and seventy-five.

SAML. BLATCHFORD.

39 (Indorsed:) John Warren and J. Kearney Warren against Sheridan Shook, collector, &c. Citation. Phelps & Knevals, plffs.' attys., 82 Nassau st., N. Y. To George Bliss, atty. for deft. in error.

Due service of copy of within citation is hereby admitted.
New York, April 13, 1875.

GEORGE BLISS,
U. S. Aty.

Fil'd Apl. 13, 1875.

(Indorsement on cover:) No. 856. John Warren & J. Kearney Warren, plaintiffs in error, *vs.* Sheridan Shook, late collector of internal revenue. S. New York C. C. U. S. Filed 29th November, 1875.

In The Supreme Court of the U. S.

JOHN WARREN and J. KEARNEY WARREN, Plaintiffs in Error, *vs.* SHERIDAN SHOOK, late Collector of Internal Revenue, Defendant in Error.	No. 856.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.—ADVANCED UPON MOTION OF THE ATTORNEY GENERAL AND HEARING FIXED FOR FEBRUARY 8, 1876.

Brief for JOHN WARREN *and* J. KEARNEY WARREN, *Plaintiffs in error.*

In The Supreme Court of the U. S.

JOHN WARREN and J. KEARNEY WARREN, Plaintiffs in Error, *vs.* SHERIDAN SHOOK, late Collector of Internal Revenue, Defendant in Error.	No. 856.

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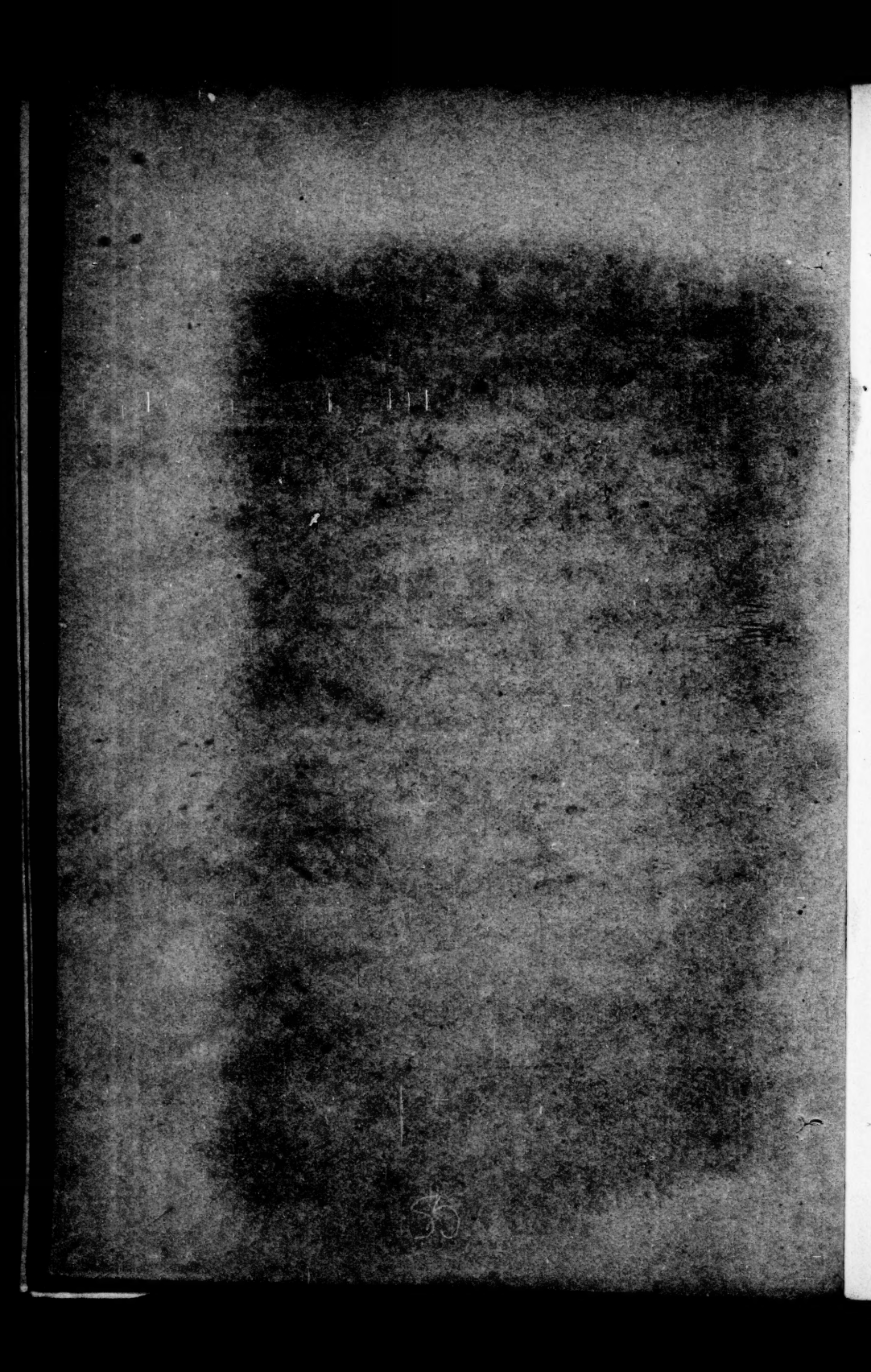
Brief for JOHN WARREN *and* J. KEARNEY WARREN, *Plaintiffs in error.*

STATEMENT OF THE CASE.

The plaintiffs in error were engaged from April 1, 1865, to May 1, 1866, in the banking business in the city of New York, under the firm name of John Warren and Son, and during that period paid duly the special tax imposed upon them as bankers, in accordance with the requirements of the seventy-ninth section of the "Act to provide Internal Revenue to support the Government, etc.," approved June 30, 1874. During that time, they paid to the defendant in error, who was then Collector of Internal Revenue for the 32d district of New York, the



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tax of one-twentieth of one per centum on stock, securities, gold, etc., provided for by the ninety-ninth section of the said act, to be paid by brokers, and bankers doing business as brokers. This one-twentieth of one per centum was assessed upon all sales of stock, securities, gold, etc., made by plaintiffs in error, as well as those made upon their own account, as those made upon account of others.

The plaintiffs in error admitted their liability to pay this tax of one-twentieth of one per centum upon all sales made by them on account of others, or upon commission, but protested against their liability to pay the said tax upon sales made by them solely on their own account, paid the sum assessed upon such sales under protest, appealed to the Commissioner of Internal Revenue, pursuant to law, from the assessment and collection thereof, and upon the decision of said Commissioner being rendered adversely to them, and within six months thereafter commenced this action to recover the sum of three thousand three hundred and eighty-six $\frac{43}{100}$ dollars, being the amount of the tax of one-twentieth of one per centum assessed and collected from them upon sales of stock, securities, gold, etc., sold by them on their own account, while doing business and paying special tax as bankers between April 1, 1865, and May 1, 1866.

The facts were agreed upon and submitted to the Circuit Judge of the United States for the Second Circuit, and the issue tried before him without a jury, upon the agreed statement of facts, and he ordered judgment for the defendant, and to review that judgment, the plaintiffs being error to this Court.

The question involved is, whether bankers paying the

special tax imposed upon them as such, were liable under the ninety-ninth section of the "Act to provide Internal Revenue," etc., approved June 30, 1874, to pay a tax of one-twentieth of one per centum upon sales of stock, etc., made by them on their own account, and not for others, or upon commission.

The plaintiffs in error concede that as to all sales made by them on commission, or for others, they were "bankers doing business as brokers," and therefore liable to the tax of one-twentieth of one per centum, but claim that as to all sales made by them for themselves and on their own account only, they were not liable to such tax, but were at liberty to make such sales without payment thereof.

The defendant in error claims that the plaintiffs in error by selling stocks, etc., upon commission for others, were bankers "doing business as brokers," and were, therefore, liable to the tax of one-twentieth of one per centum upon all sales made by them, whether for their own account or for others.

ERRORS ASSIGNED.

The errors which are claimed to have been made in the disposition of the cause in the Court below are,

1st. That the Court erred in denying the motion of plaintiff's counsel that judgment be entered for the plaintiff.

2d. That the Court erred in granting the motion of the defendant's counsel that judgment be entered for the defendant.

3d. That the Court erred in directing judgment to be entered for the defendant.

The learned and lamented Circuit Judge, in rendering his decision below, puts it upon the decision theretofore rendered by him in the case of Northrup *vs.* Shook, 10 Blatchford, 243, saying, "I find no sufficient reason for doubting the correctness of my conclusion in Northrup *vs.* Shook on the question in controversy in these cases."

The opinion referred to is as follows. After holding that the plaintiffs in that case were bankers, doing business as brokers, and therefore liable to the tax of one-twentieth of one per centum, he proceeds:

"Q. If thus taxable, was the tax rightfully assessed "upon *all* their sales, whether of their own property, or "of the property of others coming to their possession, and "held for advances made by them as bankers, or pur-"chased and sold on speculation for the account of others, "on commission?

"The Supreme Court have, I think, relieved me of any "responsibility or embarrassment in deciding this question. "The section imposing the tax is explicit: that all "brokers and bankers doing business as brokers, shall "pay the tax on the sales enumerated. In United States "*vs.* Cutting (3 Wallace 441), the Supreme Court decided "that the sales of stocks, bonds, gold, etc., made by brokers "for themselves, are subject to the same duties as these "made for others. The statute places bankers doing "business as brokers in the same condition in which it "places brokers. In that respect, the terms are explicit, "and this decision seems to me conclusive. It is true, "that, in United States *vs.* Fisk (*id.* 445), at the same "term, the Supreme Court decided that bankers who only

"sell for the United States, and for themselves, and who "do not sell for others for a commission, are not liable to "the taxes or duties imposed upon sales. But the Court "is careful to discriminate between bankers who only sell "for themselves, and the United States, and bankers who "sell for others for a commission, that is, bankers who do "business as brokers. The plain implication from this "case is, therefore, in exact accord with the case of United "States *vs.* Cutting, and confirms the above statement of "the effect of the decision therein."

STATUTES WHOSE PROVISIONS ARE TO BE CONSTRUED IN DETERMINING THE QUESTION INVOLVED IN THIS CASE.

1. Section 110 of the Act to provide Internal Revenue, etc., approved June 30, 1864. 13 U. S. Stat. at Large, 277.

   This section imposes a duty of one-twenty-fourth of 1 per cent. each month on deposits, one-twenty-fourth of 1 per cent. each month on the capital, one-twelfth of 1 per cent. each month on the circulation, and an additional one-sixth of 1 per cent. on certain specified excess of circulation; required to be paid by "any bank association, company, or corporation, or person engaged in the business of banking, beyond the amount invested in United States bonds."

2. Section 79, sub-division one of the same act. (13 U. S. Stat. at Large, p. 251.) provides

   "That bankers using or employing a capital

"not exceeding the sum of $50,000 shall pay $100
"for each license," and for every additional $1,000
"of capital $2.00, and that "every person, firm
"or company, and every incorporated or other bank
"having a place of business where credits are op-
"ened by the deposit, a collection of money or cur-
"rency, subject to be paid or remitted upon draft,
"check or order, or where money is advanced or
"loaned on stocks, bonds, bullion, bills of exchange,
"or promissory notes, or where stocks, bonds, bul-
"lion, bills of exchange, or promissory notes are
"received for discount or sale, shall be regarded a
"banker under this act."

3. The same section 79, subdivison 9 (13 U. S. Stat. at Large, p. 252), provides

"That every person, firm or company, except
"such as hold a license as a banker, whose business
"it is, as a broker, to negotiate purchases or sales
"of stocks, exchange, buillion, coined money, bank
"notes, promissory notes, or other securities, shall be
"regarded as a broker, under this act, and shall
"make oath or affirmation according to the form
"to be prescribed by the Commissioner of In-
"ternal Revenue, that all their transactions are
"made for a commission; provided, that any person
"holding a license as a banker shall not be re-
"quired to take out a license as a broker," and it further provides that "Brokers shall pay fifty
"dollars for each license."

This sub-division was amended by the first

section of the act of March 3, 1865, 13 Stat. at Large, p. 472, by inserting after the words "other securities," the words, "for themselves or others," and by striking therefrom the words " and shall make oath or affirmation, according to the form to be prescribed by the Commissioner of Internal Revenue, that all their transactions are made for a commission."

4. The ninety-ninth section of the same act (13 U. S. Stat. at Large, p. 273), provides

"That all brokers and bankers doing business as "brokers, shall be subject to pay the following "duties and rates of duty upon the sales of mer- "chandise, produce, gold and silver bullion, foreign "exchange, uncurrent money, promissory notes, "stocks, bonds, or other securities, as hereinafter "mentioned, and shall be subject to all the pro- "visions, where not inapplicable thereto, for the "returns, assessments, collection of duties, and "liens and penalties as are prescribed for the per- "sons, firms, companies, or corporations, owning or "possessing, or having the management of rail- "roads, steam-boats and ferry-boats—that is to say, "upon all sales and contracts for sales of stocks "and bonds, one-twentieth of one per centum on "the par value thereof, and of gold and silver bul- "lion and coin, foreign exchange, promissory notes, "or other securities, one-twentieth of one per "centum on the amount of such sales, and of all "contracts for such sales: Provided, That any per- "son, firm or company, not being licensed as a

"broker, or banker, or wholesale or retail dealer, "who shall sell, or offer to sell, any merchandise, "produce, or gold and silver bullion, foreign ex- "change, uncurrent money, promissory notes, "stocks, bonds, or other securities, not *bona fide* at "the time his own property, and actually on hand, "shall be liable, in addition to all other penalties "provided in such cases, to pay fifty per centum in "addition to the foregoing duties and rates of "duty."

CASES IN WHICH THE CONSTRUCTION OF ABOVE PROVISIONS OF THE STATUTE HAVE BEEN CONSIDERED.

United States *vs.* Cutting, 3 Wallace, 441,

Holds that the effect of the amendment of March, 3, 1865, to the ninth sub-division of the seventy-ninth section of the Act of June 30, 1864, inserting the words "for themselves or others" was to subject sales made by a broker for himself to the same tax as those made for others. Opinion by Mr. Justice Grier.

United States *vs.* Fisk, 3 Wallace, 445,

Holds that the purpose of the amendment of 1865 to the ninth sub-division of the seventy-ninth section "was "evidently not to change the correct definition given of "the term 'broker' and to make it mean that every man "who sold his own stock was a broker, and liable to pay "fifty dollars for a license. The obvious purpose of the "amendment was to compel *brokers* to render an account "of all sales made, whether for themselves or others, and

"to pay the duty on them." And affirms the judgment of the Circuit Court of New York declaring that Fisk & Co., who were bankers, doing a general business *as such*, making returns, and paying duties and taxes imposed by law upon their capital and deposits, and who, as such, negotiated and sold for the United States large amounts of government securities, and at the same time bought and sold government securities for themselves, and not for others or for a commission, were not liable on sales made by them, for *themselves*, to pay the duties imposed by the ninety-ninth section "upon brokers and bankers doing business as brokers," in addition to those imposed upon them as bankers. Opinion by Mr. Justice Grier.

Luther C. Clark and others *vs.* Gilbert *et al.*, 5th Blatchford, 330.

This was a case involving the precise point in issue in the case at bar. It was an application for an injunction to restrain the assessment and collection of this very tax of one-twentieth of one per centum, on sales on their own account to which it was claimed that plaintiffs who were bankers, doing business as such, and who also sold stocks, etc., on commission, and also on their own account, and not on commission, were liable as bankers doing business as brokers.

Mr. Justice Nelson holds that as to sales made by the plaintiffs for others and on commission they must be regarded as doing business as brokers, and liable to the tax, but that they are permitted by their license as bankers to sell on their own account, and are not liable to the one-twentieth of one per centum tax on such sales. He says: "But it is urged, that if the plaintiffs in any of their deal-

The only remaining case in which these statutes have been construed, in the particulars affecting this case, is that of Northrup *et al. vs.* Shook (10 Blatch., 243), upon which, as stated *supra*, Justice Woodruff decided this case below, and it was there held, as already intimated, that a banker who sold stocks, etc., for others, and upon commission, was a banker doing business as a broker, and liable to pay the broker's tax upon all his sales, whether made upon account of others or upon his own.

It may be mentioned, historically, that the decisions of Mr. Justice Nelson, in Clark *vs.* Gilbert, and in Peabody *vs.* Gilbert, were rendered in July, 1866, and injunctions issued thereupon to restrain the assessment and collection of the tax of one-twentieth of one per centum upon sales made by the plaintiffs therein on their own account; that those decisions were acquiesced in by the Internal Revenue Department, no steps taken to dissolve the injunctions, and no effort made after that, in the city of New York, at least, to assess or collect the broker's tax upon sales of stocks, bonds, etc., made upon their own account by persons who paid their special tax or license-tax as bankers.

ARGUMENT.

I.

It may be fairly assumed under the provisions of the above cited, and the construction thereof by this Court in the case of United States *vs.* Fisk.

a. That a banker was intentionally subjected to pay a higher license-tax or special tax than a broker.

Bankers were liable not only to the tax upon deposits, etc., provided for in section 110, but had to pay a tax upon his capital in any event, not less than $100, and increasing beyond that, according to the amount of his capital, according to subdivision one of the 79th section, while brokers were only required to a pay license or special tax of $50 by the ninth subdivision of the same section.

b. That, prior to the amendment of March 3, 1865, nobody was required to pay the one-twentieth of one per centum tax on any sales except those made strictly as brokers, *i. e.* upon account of others.

c. That up to the passage of that amendment, bankers, if they sold for commission on account of others, would have been liable as bankers doing business as brokers, to the tax upon such sales, and upon no others.

d. That the business of a banker to carry on which he paid his special tax and license, covered and included fairly his sales of stocks, etc., upon his own accounts. The power to sell was a necessary incident to the business of advancing or loaning on stocks, bonds, etc., and of receiving stocks, bonds, etc., "for discount or sale," which is part of the business, the carrying on of which makes a man a banker under the first sub-division of section 79.

e. In selling, then, on his own account, the banker is in no sense doing business as a broker.

This may certainly be claimed on the authority of United States *vs.* Fisk.

II.

The definition of a broker given in the ninth sub-division of the seventy-ninth section, is applicable to every one who does the business therein set forth, except the man who "holds a license as a banker." Therefore while a person not licensed as a banker, selling securities on his own account must, subsequent to the amendment of March 3, 1865, be regarded as a broker; the banker was not so regarded, nor could he be said while engaged in selling simply on his own account to be doing business as a broker.

III.

The law, then, subsequent to the amendment of March 3, 1865, taxed all sales of stocks, bonds, etc., in some way. Persons selling on their own account, but not having paid a license as bankers, were ranked as brokers, and paid taxes accordingly, as brokers, while bankers paid their taxes as bankers, covering all things necessarily incident to their business as bankers; but as to things not incident to their business as bankers, but in which they did business as brokers, they became liable to pay the broker's tax.

IV.

If, in addition to paying the brokers' tax on sales made by them as brokers, bankers are also to be taxed thus on sales on their own account, then they are compelled to submit to double taxation. For we have seen that the selling of stocks, etc, on their own account, is a necessary

incident of the business for which they pay tax as bankers while it certainly is not a *necessary* incident of the business of a broker. A broker has no occasion, so long as he confines himself strictly to the business of paying and selling for others upon a commission, to make any sales whatever on his own account.

Prior to the amendment of March 3, 1865, the banker was the only person who paid any tax for sales made by him upon his own account. This he did by payment of his capital tax and his higher rate of special tax. Surely, we may believe that it was rather the intention of Congress to equalize the taxation by imposing burdens upon the the broker which brought him upon more nearly the same footing with the banker, than to compel the banker to pay again for doing that which he had once already paid for.

V.

The effect of the amendment of 1865 was, as Mr. Justice Grier says in U. S. *vs.* Fisk, not to change the correct definition of the term "broker," but to compel *brokers* to render an account for all sales made by them, whether on their own account or for others. As the court held in that case, bankers selling their own stocks were not thereby doing business as brokers. How can it be claimed that, if, in selling their own stock to-day, they are not doing business as brokers, and therefore not taxable, they can yet be compelled to pay the tax, because yesterday they sold as brokers upon which they were liable? If he is only liable when doing business as a broker, how can he be liable when *not* doing business as a broker? It is sub-

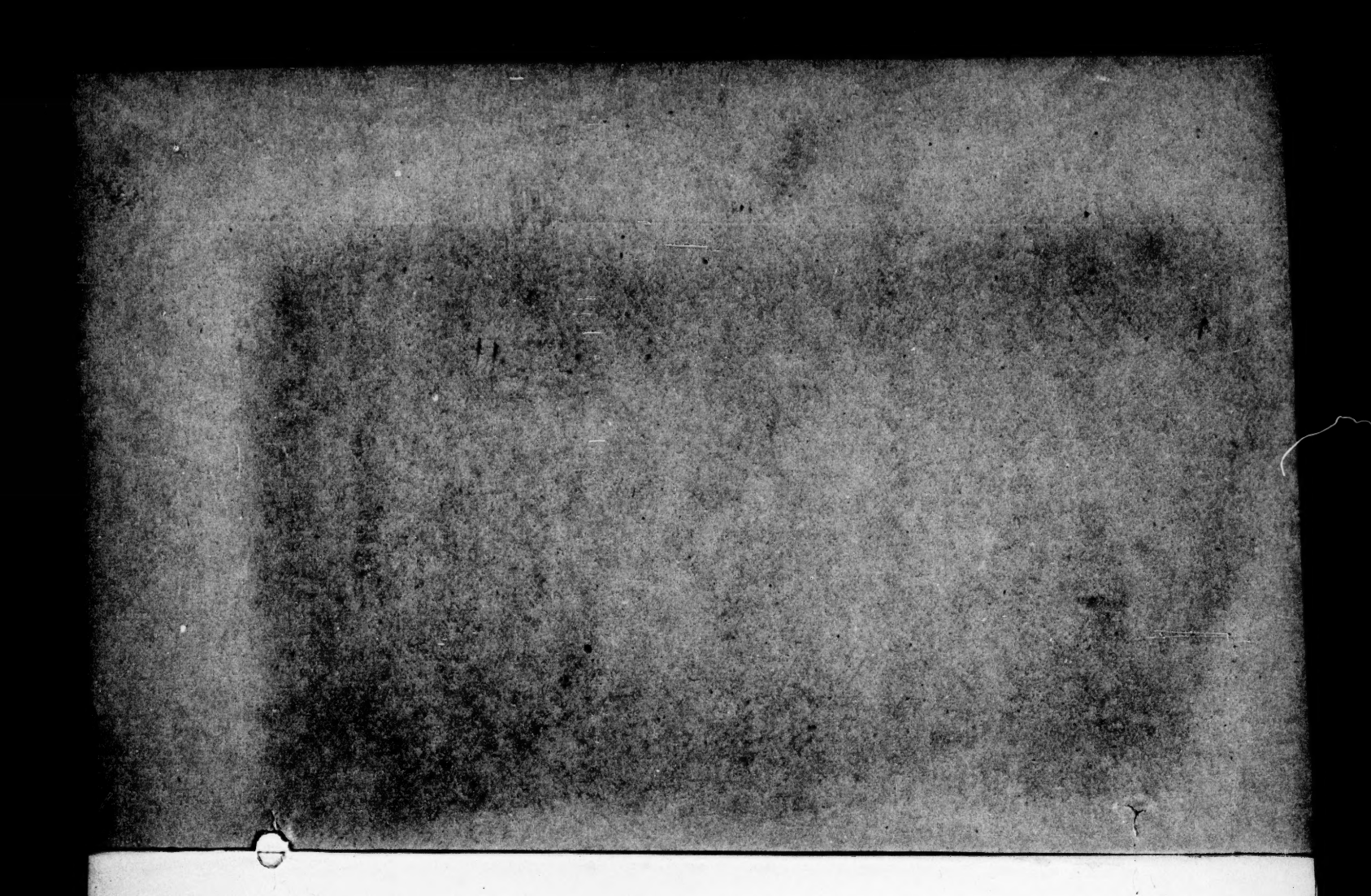
mitted that to maintain the liability of the plaintiffs to this tax, it will be necessary to do what Mr. Justice Grier said must be done, that is, to interpolate the important word "not" and to construe it as including bankers who do "not" as well as those who "do" transact business as brokers.

The effect of the construction claimed by the Government would be this: A, being a banker with a large capital, pays the special tax thereon as a banker, and thereby acquires the right to buy and sell stock, etc., upon his own account, to the amount of millions of dollars, having paid for that privilege by the large special tax imposed upon him. But if, as a broker, *i. e.*, upon commission, he sells one share of stock, he is to be held to pay not only upon that transaction which is no part of his business as a banker, but for everything that he has done as a banker, and under the privilege earned by the payment of the large special tax imposed upon him as such. Such a construction would be most inequitable. It is not rendered necessary by the language employed, nor is it to be fairly deduced therefrom.

VI.

There being no other question involved in this case, the judgment of the Circuit Court should be reversed, and a *venire de novo* awarded.

BENJAMIN K. PHELPS,
Of Counsel for Plaintiffs in Error.



In the Supreme Court of the United States.

OCTOBER TERM, 1875.

JOHN WARREN ET AL., PLAINTIFFS IN ERROR,
vs.
SHERIDAN SHOOK, COLLECTOR, &C. } No. 856.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief for the United States.

In the Supreme Court of the United States.

OCTOBER TERM, 1875.

JOHN WARREN ET AL., PLAINTIFFS in error,
vs.
SHERIDAN SHOOK, COLLECTOR, &C. } No. 856.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief for the United States.

It appears by the record (pp. 8 to 11) that the plaintiffs, licensed as *bankers*, bought and sold gold and stocks upon commission for others, as well as upon their own account, in a manner that would make *brokers* liable under the act of June 30, 1864, as amended by the act of March 3, 1865, to the tax assessed, as held in U. S. *v.* Cutting, (3 Wallace, 441.) There is no good reason why the plaintiffs, doing the same business, should not pay the same tax, unless the peculiar phraseology of the statute necessitates an exemption.

I.

The plaintiffs are licensed as bankers under act of 1864, c. 173, § 79, (13 Stats. at Large, 251,) and do a

banking business as there defined and as generally understood, and something more. That definition is (substantially) the "having a place of business where credits are opened by the deposit or collection of money or currency, subject to be paid or remitted upon draft, check, or order, or where money is advanced or loaned on stocks, bonds, bullion, bills of exchange, or promissory notes, or where stocks, bonds, bullion, bills of exchange, or promissory notes are received for discount or sale."

Brokers are declared (upon the next page, 252,) to be those whose business it is "to negotiate *purchases* or sales of stock, exchange, bullion, coined money, bank-notes, promissory notes, or other securities *for themselves or others*." The last four words, italicized, were added by the amendatory act of March 3, 1865, (13 Stats. at Large, 472.)

Bouvier defines a banker to be one who receives money upon deposit, effects loans, discounts notes, and (where not forbidden by statute) issues his own notes for circulation.

Grant commences his treatise upon banking with these paragraphs: "The ordinary relation between banker and customer is this: The customer opens an account with the banker by paying a sum of money into the bank, the banker undertaking to hold himself liable for the payment of a like sum to the customer's use," &c., "and to pay the customer's checks or orders to the extent of the sum deposited."

"A less ordinary, but still not uncommon, relation between banker and customer is, that the banker makes advances to the customer, or allows him to overdraw his account, charging interest on the advances, and in most cases requiring a deposit of securities," &c.

"But neither of these relations partakes of a fiduciary character, nor bears analogy to the relation between principal and factor or agent, who is *quasi* trustee for the principal with respect to the particular matter for which he was appointed factor or agent." * *

"But although there is nothing in this ordinary relation to constitute the banker a trustee, he may, of course, by agreement, take upon himself the character of an agent, or make himself a trustee toward a *cestui que trust;* for example, if a customer deposits exchequer bills with a banker, and he undertakes to receive the interest upon them, or undertakes to negotiate or make sale of them and to credit the customer's account with the proceeds of the sale, in this case it is obvious he is in the position of a trustee, and partly, at least, sustains a fiduciary character, *but this service may or may not be appended to his employment of banker; his trade of banker is totally independent of it;* his trade of banker consists of the general trade, *to which the other is an accidental addition. So where the banker receives money to invest in stock,* or receives orders to appropriate the customer's balance, or a specified part of it, to any specified purpose, and assents or does not repudiate the orders, he is in the situation of a trustee or agent with reference to that money," &c. (Grant on Banking, 1, 2; 4, 5.) These ideas are also expressed, partly in the same language, by Lord Brougham in Foley *v.* Hill, 2 House of Lords Cases, 43, 44, where he elaborates the distinction between a banker and an agent or trustee.

The funds left with a banker by a depositor are not held by the former as the bailee of the latter, whether arising from coin or currency, or from the discount of a note, or from the sale of bullion or stocks. Commercial

Revenue laws [illegible] 406;
56 Barb. 218; 38 Ct. 443.

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Bank *v.* Hughes, 17 Wend., 94; Marsh *v.* Oneida Central Bank, 34 Barb., (Sup. Ct.,) 298, and cases cited. The opening sentence of the second chapter of Morse on Banking is this: "It is of the essence of the business of banking that the bank or banker should receive *on deposit* the money and funds of other persons," by which, he proceeds to say, the relation created between the banker and customer "is simply that of debtor and creditor at common law," and that the banker cannot be charged "as a trustee, *quasi* trustee, factor, or agent." (Morse on Banking, 25, 26; Watts *v.* Christie, 11 Beavan, 551.) The sums deposited are *loans* to the banker. (Sims *v.* Bond, 5 Barn. & Ad., 393.) In this use of the words, "*loan*" and "deposit" are identical, and are so treated in statutes. Curtis *v.* Leavitt, 15 N. Y., 166, 167, where it is said that "a banker is a dealer in capital, an intermediate party between the borrower and lender;" the difference between the terms at which he borrows and lends constituting his profits. (1 McCulloch's Com'l Dict., 86.)

This is the broad line of demarkation, that the banker's peculiar business is to furnish "credits" to his customer; and the statute (like the common law) recognizes the *sale* or pledge of stocks as one means of affording such credits. It is only as incidental to the attainment of this object that this manner of dealing is mentioned. It is the establishing of "a place of business where *credits* are opened," whether in one mode or another, that makes one a banker. (Oulton *v.* Savings Institution, 17 Wallace, 118.) The customer may put money, bullion, notes, or stocks, into his banker's hands as a means (or source) of credit, or advances may be made, and his checks honored, without any security; but for the

See Bonamy Price on Currency and Banking. chap. III, "What is a bank;" p.p. 96 et seq; especially p. 102.

banker to *buy* stocks for his customer affords the latter no "credits" upon which to draw, and is no part of a *banking* business; it is the act of an agent or trustee; that is to say, of a broker. (41 N. Y., 240, cited *infra.*) "It is not within the scope of the business of bankers to seek or make investments generally for their customers." (Bishop *v.* Countess of Jersey, 2 Drewry's Rep., 163.) They may sell out stocks to create a credit at the bank; or occasionally invest by specific instructions in shares named under a special authority by letter, or power of attorney; (*Id.*;) but in such instances, as before stated, they become agents, acting outside of a regular banking business.

The real question is whether or not the transactions mentioned in the record were in good faith, intended merely to extend "credits" and banking facilities to the customers, or were they intended to procure stocks for temporary or permanent investment, and as a means of speculation in the stocks themselves; if the latter, they were the merest, most common, acts of brokerage agency. (Markham *v.* Jaudon, 41 N. Y., 240, per HUNT, Ch. J.)

Nor is the buying and selling of stocks upon their own account any part of the business of banking, as is obvious; since it affords "credits" to nobody.

II. (see top of page 2, ante)

The before-quoted declaration of what constitutes one a *banker* is found in the act of 1864, c. 173, §79, subdivision "one," 13 Stats. at Large, 251. Substantially, two per cent. of the capital employed is the license-fee for carrying on this business. (*Ib.*) The ninth subdivision of the same section, found upon the succeeding page, (252,)

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says: "Brokers shall pay fifty dollars for each license. Every person, firm, or company, except such as hold a license as a banker, whose business it is as a broker to negotiate purchases or sales of stock," &c., "for themselves or others" [by amendment per act of March 3, 1865, c. 78—13 Stats. at Large, 472] "shall be regarded as a broker under this act: *Provided*, That any person holding a *license* as a banker shall not be required *to take out a license* as a broker."

This same act of 1864, c. 173, by section 99, 13 Stats. at Large, 273, enacts "that all brokers, *and bankers doing business as brokers*," shall be subject to pay the specified duties upon the *sales* of the various species of property there enumerated.

Section 110 of this act, page 277 of same volume, indicates the duty to be paid by banks and bankers on *deposits*, *capital*, and *circulation*.

A comparison of these provisions shows that each pays a *license* to do that business in which he engages, and *duties* or *taxes* applicable to each, with the qualification that the banker, paying the much higher rate, shall not be called on to pay an additional *license-fee* for a *permit* to add to his banking business that of a broker; but if he does so, he must pay the *duties* or *taxes* imposed upon each avocation, *i. e.*, upon the *deposits*, *capital*, and *circulation* of the banker, and upon the *sales* of the broker.

This would seem too plain for elaboration, were it not that a late distinguished justice of this court is quoted as holding the contrary in Clark *v.* Gilbert and Shook, (5 Blatch., 330,) and so construing U. S. *v.* Fisk, (3 Wallace, 445,) which to us seems hardly capable of such construction, and not at all antagonistic to the positions we have here assumed.

Fisk and Hatch, according to paragraph 2, middle of page 446, sold nothing but U. S. securities, & these only for themselves.

Fisk & Hatch *sold* Federal securities ONLY for the Government and for themselves; they *bought* none for any other person; consequently were not brokers but bankers. They were recognized as *bankers* for the United States; loans to the Government, and "credits" for its use, to be drawn upon by its Treasury agents, being opened at this banking-house by deposit and sale of these Federal securities. The case finds (3 Wall., 446) that they did a general banking business *and none other;* and the authorities cited at the commencement of this brief show that this does not include the purchase of stock for customers, which is an act of agency and brokerage. (3 Wallace, 448.)

While it is true that there is no tax upon *purchases* of stock, it is equally so that the *business* of buying them for re-sale for others is *brokerage*, and subjects the party to the tax assessable upon the amount sold in the course of such brokerage business, whether the sale be "for themselves or others." In other words, such business of purchase makes a man a broker; and being a broker, he must pay the stated tax upon the sales made by him in that capacity. One who does "business as a broker" *is* a broker, whether he also be a lawyer, a banker, or shoemaker, or not; because the names merely indicate such persons as do the acts peculiar to each occupation. If it be said that, by the language of the act of 1864, § 79, subdivision 9, he is not to be deemed a broker, if licensed as a banker, the answer is that (by § 99) he is then to be deemed a banker, "doing business as a broker;" which, for the purpose of this tax, amounts to precisely the same thing, that section making no distinction in this respect between these persons, doing exactly the same business. It imposes the tax upon "*all* sales,"

He who holds a license as a broker is not acting as a broker in the single act of selling for himself; but if he does a brokerage business generally, then he must a/c for all sales, - for himself or others;" and so, by the same section, must a banker "doing business as a broker;" though the single act of a sale upon his own a/c be not such business.

unqualifiedly. It is conceded to mean "all" as to brokers; then, why not absolutely all, with respect to everybody who does the business of brokerage? The banker and broker each pay their respective licenses, graduated according to the well-known profitableness of each business. Why should the latter find in the former a competitor in the same field who, under a banker's license only, with the advantage of large capital, can do all that the broker is allowed to do, and a vast deal more? The taxes paid by the banker, who confines himself strictly to his legitimate business, as before remarked, are placed solely upon those items which are the peculiar characteristics of banking; while those paid by brokers are upon business appropriate to their avocation, within which category come all those things for which the taxes in controversy were assessed. The privilege of carrying on two occupations under one license was a sufficient reason for exacting a higher license-fee from bankers, without exempting them from the tax on sales, to the detriment, if not extinguishment, of the race of brokers, and the great diminution of the Federal revenues; since it is easy to see that nearly all transfers of stock will hereafter be made by bankers instead of by brokers if the doctrine contended for by the plaintiff be enunciated by this court.

It is admitted by the case and by the argument that for *some* sales of stock those holding a banker's license are taxable under section 99; but for some reason undisclosed by the statute or the record, and not quite clearly apparent from the counsel's brief, the plaintiffs claim to make a distinction between sales made by them for others and those made upon their own account. The statute makes none such. If they are merely bank-

ers they are not taxable upon sales at all; if "bankers doing business as brokers," they are taxable for *all* sales, whether made "for themselves or others." Thus the question again resolves itself into this, whether or not they are "doing business as brokers." Is such the nature of their general business, for which offices and clerks are hired, books kept, and to which their minds, energies, and efforts are directed? The facts found by the court answer this inquiry affirmatively. (Northrup *v.* Shook, 10 Blatch., 243, 248, *et seq.*; United States *v.* Cutting, 3 Wallace, 441.)

This statute imposing the tax must be considered as a whole, in view of the ends to be accomplished and the intention of the legislature to provide appropriate means. (Sedgwick on Stat. Law, 225, 235, &c.; Potter's Dwarris, 175–178, 184, &c.; Minor *v.* Bank, 1 Peters, 64; Winslow *v.* Kimball, 25 Maine, 493; Wilkinson *v.* Leland, 2 Peters, 662; People *v.* Utica Insurance Company, 15 Johns., 358; Crocker *v.* Crane, 21 Wend., 211; Catlin *v.* Hall, 21 Vermt., 152; Rawson *v.* State, 19 Conn., 192; ~~Cove *v.* Brazier, 3 Mass., 380,~~ and books *passim.*) The converse of this, that a statute ought not to be so construed as to defeat its obvious purpose, is declared in The Emily *v.* The Caroline, 9 Wheaton, 381; Cook *v.* Commis., 6 McLean, 112. And especially ought the law to be so expounded (if possible) as to do substantial *justice*, for the administration of which courts are organized, and not to create unjust discriminations. (Russell *v* Smith, 9 Mees. & Wels., 818.)

What is the general object to be attained? Evidently that declared in the *title* of the act, which may fairly be referred to, (United States *v.* Fisher, 2 Cranch, 386,)

Revenue laws liberally construed. 10 Wall. 406; 56 Barb. 218; 38 Ct. 443.

"to provide internal revenue," &c. This could be accomplished only by imposing duties upon certain articles and employments, by whomsoever used; the purpose of the legislation precludes the idea of any intentional discrimination between the individuals doing the dutiable acts, whether called bankers or brokers.

But a defect was found in the original enactment, in that it imposed the duty only upon sales made for others; and that every broker thereafterward ostensibly bought stock, &c., for himself, though he invariably found a customer immediately afterward to take it off his hands, to whom the broker made a sale upon his own account. To remedy this mischief, the amendment of March 3, 1865, was passed, requiring the tax on sales to be paid, whether made by the seller "for himself or others." It was a tax upon the business, the same in kind as was formerly imposed upon that of merchants selling their own goods, manufacturers their own wares, &c., &c.

Shall this attempt to protect our revenues against depletion by evasion merely result in encouraging another evasion by allowing the substitution of the name of "banker" for that of "broker," to relieve the seller from all tax upon this extensive and lucrative business? We do not believe this court will sanction any such construction, that has the effect to defeat almost entirely the purpose sought in the imposition of this tax, and in the amendment made in 1865 to the original statute.

EDWIN B. SMITH,
Assistant Attorney-General.